Dec 5 Cert for Plff in Mr Adams
argued by Mr Robinson
Dec 7 Motion
Dec 14 Affd Circuit Ct

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SUPREME COURT OF THE UNITED STATES.

No. 294.

JOHN L. CROOM, PLFF. IN ER.,

vs.

HENRY SHELDEN.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE EASTERN DISTRICT OF TEXAS.

G. S. Gideon, Printer, 511 Ninth street, Washington.

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to pay Henry Shelden, or order, thirty-five hundred seventy-four 08-100 dollars, with interest from date, at ten per cent.

JOHN L. CROOM.

$1,932 62-100. WHARTON, May 2, 1856.

On the first day of January next, for value received, I promise to pay Henry Shelden, or order, nineteen hundred and thirty-two 62-100 dollars, with interest from date, at ten per cent.

JOHN L. CROOM.

Wherefore, the plaintiff brings suit, and prays judgment against the defendant for the amount of said notes with interest, according to their tenor, and for costs of suit in this behalf expended, and for process to issue, citing the defendant to appear at the next term of your honorable court for said district, to be holden at Galveston, and then and there to answer this petition, and for such other order or decree he may be entitled to.

Pr. PHILIP C. TUCKER,
Attorney.

And afterwards, on the 6th day of November, 1857, a citation issued against the defendant, in words and figures as follows:

The United States district court, eastern district of Texas.

The President of the United States of America to the marshal of the eastern district of Texas, or any of his lawful deputies, greeting:

You are hereby commanded to summon John L. Croom, if he be found in your district, to be and appear before the honorable the district court of the United States, at a court to be holden in and for the eastern district of Texas, at the city of Galveston, on the first Monday of December next, to answer to the petition and complaint of Henry Shelden against John L. Croom, in an action of debt on two notes in the sum of five thousand five hundred six and 70-100 dollars, with interest as alleged, and costs of suit, of which you will serve the said defendant, John L. Croom, with the accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and the seal of said court. Done at the city of Galveston, this sixth day of November, A. D. 1857, and the eighty-second year of the independence of the United States of America.

[L. S.]

JAMES LOWE, *Clerk.*

And afterwards, the marshal made return on the said citation, in words and figures, as follows:

"Received November 9th, 1857, and on the 14th day of

November, 1857, I executed this writ, by giving the defendant, John L. Croom, a true copy hereof, and a certified copy of the petition.

BEN. McCULLOCH, *U. S. M.*
By IRA A. HARRIS, *Deputy.*

And afterwards, on the 11th day of December, 1857, the defendant, by his attorney, filed his answer, in words and figures as follows:

In United States district court for eastern district of Texas, sitting at Galveston, Der. term, 1857.

HENRY SHELDEN
v. } No. 693.
JOHN L. CROOM.

Now comes the defendant in the above entitled cause, by his attorneys, and says that plaintiff ought not to have and maintain his said suit against this defendant, because plaintiff's petition, and the matters and things therein contained, as therein stated and set forth, are not sufficient in law. Wherefore, he prays judgment, &c.; and should his special and general demurrer be overruled, this defendant answers and denies all and singular the allegations in plaintiff's petition, and says that the same are untrue. Wherefore he prays judgment, &c.

BALLINGER & JACK,
Defts. Attorneys.

And afterwards, on the 14th day of December, 1857, an order was entered in said cause, in words and figures as follows:

HENRY SHELDEN
v. } No. 693.
JOHN L. CROOM.

By agreement of parties, by their attorneys, and consent of the court, this cause is set down for hearing on the twenty-first day of this month.

And afterwards, to wit, on the 15th day of December, 1857, the defendant filed a motion to quash the service and return, in words and figures as follows:

United States district court, eastern district of Texas.

HENRY SHELDEN
v.
JOHN L. CROOM.

Now comes the defendant, John L. Croom, and appearing only for the purpose of this exception and motion, and excepts to the

service of process made upon him in this cause, and says that the same was not sufficient in law; that the only pretended service of citation in this cause made on him was by delivering to this defendant the pretended copy of citation which is annexed hereto, and made a part of this plea; that he has not been otherwise served with any citation, and that the same is not correct or sufficient in law, all which he is ready to verify; wherefore, he moves and prays the court that the return of service herein on this defendant be quashed.

BALLINGER & JACK,
For Deft.

John L. Croom, the above defendant, on oath, says that the matters stated in the above plea are true.

JOHN L. CROOM.

Sworn to and subscribed before me, at Matagorda, on the 11th day of December, 1857. Witness my hand and official seal, date aforesaid.
[L. S.]

A. WADSWORTH,
Notary Public, Matagorda county, Texas.

The citation referred to and made an exhibit in the foregoing plea, is in words and figures as follows, to wit:

The United States district court, eastern district of Texas.

The President of the United States to the marshal of the eastern district of Texas, or any of his lawful deputies, greeting:

You are hereby commanded to summon , if he be found in your district, to be and appear before the honorable the district court of the United States, at a court to be holden in and for the eastern district of Texas, at the city of Galveston, on the first Monday of December next, to answer to the petition and complaint of Henry Shelden against John L. Croom, in an action of debt on two notes in the sum of five thousand five hundred six 70-100 dollars, with interest as alleged, and costs of suit, of which you will serve the said defendant, John L. Croom, with the accompanying copy of said petition.

Witness the Hon. John C. Watrous, judge of said court, and the seal of said court. Done at the city of Galveston, this sixth day of November, A. D. 1857, and the eighty-second year of the independence of the United States of America.
[L. S.]

JAMES LOVE, *Clerk.*

A true copy of the original writ I certify.

BEN. McCULLOCH, *U. S. M.*
By J. A. H. CLEVELAND, *Deputy.*

And afterwards, to wit, on the twenty-first day of December, the defendant, by his attorney, filed an affidavit for the continuance of this cause, in words and figures, as follows:

District court of the United States, eastern district of Texas, at Galveston.

HENRY SHELDEN
v.
JOHN L. CROWN.

Now comes the defendant, John L. Croom, and says that he cannot go safely to trial at the December term of court in the above cause, for the want of the testimony of J. W. Dunlop and P. C. H. McClelland, which is material to his defence; that said witnesses reside in the city of New York, State of New York; that affiant was served with process in this case on the 7th day of November, 1857, and as soon thereafter as practicable employed counsel to defend said suit, and that there was not time by the use of any possible diligence to procure the testimony of said witnesses, so as to be prepared for trial at this term of court; that he knows of no other witnesses by whom he can prove the same facts, and seeks a continuance of this cause, not for delay, but that justice may done.

JOHN L. CROOM.

Subscribed and sworn to before me, at Matagorda, on the 11th day of December, A. D. 1857. Witness my hand and official seal, on the day and date aforesaid.

A. WADSWORTH,
Notary Public, Matagorda county, Texas.

And afterwards, on the 21st day of December, 1857, the defendant, by his attorneys, filed his pleas in words and figures, as follows:

HENRY SHELDEN
v.
JOHN L. CROOM.
No. 693.

And now, at this term of the court, comes the defendant in the above entitled cause, by his attorneys, and says he ought not to be compelled to answer plaintiff's petition filed in said cause, for that the said petition and matters and things therein contained, as therein stated and set forth, are not sufficient in law; wherefore, he prays judgment, &c. And should his above demurrer be overruled, this defendant answering, says, that it is true, as alleged in plaintiff's petition, that on the second day of May, 1856, he executed and delivered to plaintiff the two notes therein described, both maturing on the 1st January, 1857, but that it is wholly un-

true that this defendant now owes plaintiff the amount specified in said notes, but on the contrary this defendant says, that he is fairly and justly entitled to a credit on said notes in the sum of eleven hundred and seventy-three 98-100 dollars, paid to plaintiff by defendant, in the city of New York, on the 30th day of November, 1856, which said amount said plaintiff then and there undertook and agreed with defendant to credit on said note: for that heretofore, to wit, on or about the 1st day of October, 1856, this defendant shipped to plaintiff, at the said city of New York, by the vessel Mary Clinton, twenty-five bales of cotton, to be sold by plaintiff for account of this defendant, with the understanding positive and expressed that the proceeds of the sales of said cotton were to be applied to the notes herein sued on; that said cotton was accordingly sold by pltff. on the 30th day of November, 1856, and realized the said sum of eleven hundred and seventy-three 98-100 dollars, net proceeds, after deducting all charges and commissions attendant upon said shipment and sale, which said sum said plaintiff has never paid over in any way, or accounted for to this defendant, but has always and still retains in his possession.

This defendant annexes hereto, marked exhibit A, and prays that it be considered a part of this answer, account sales of said twenty-five bales of cotton, so sold by plaintiff for defendant, bearing date 30th November, 1856, and signed Henry Shelden, Lawson, & Co., which defendant avers to have been the firm name of the plaintiff at the date of said return of sales; and said account of sales was rendered for said plaintiff, and by his authority, and shows the receipt of said amount by said plaintiff, and the defendant pleads the same as off-set and as the foundation of this plea.

Defendant also annexes hereto, marked exhibit B, and prays that it be considered a part of this answer, a certain letter written by said plaintiff to this defendant, dated New York, March 18th, 1857, and signed Henry Shelden, wherein said plaintiff, referring to the notes herein sued on, admits virtually that there is only a balance due on said notes, and that the full amounts thereof, using this language:

"We wrote you the 17th of January, requesting you to forward cotton to pay the balance of your note, or draft if you preferred, to which we have no answer."

This defendant therefore specially pleads in set-off against said demands of plaintiff herein the said sum of eleven hundred and seventy-three 98-100, with interest thereon from said 30th day of November, 1856, at the rate of eight per centum per annum, for which said amount he is fairly entitled to credit on the notes sued on; all which he is ready to verify.

BALLINGER & JACK,
Attorneys for Defendant, John L. Croom.

Exhibit A, referred to in def't's plea.

"Account sales 25 bales of cotton, by Henry Shelden, Lawson & Co., per Mary Clinton, for account of John L. Croom, Esq., weighing 11,523 lbs., a 12½ c., $1,440.37.

Charges as per B. L.	$119 38
Marine insurance on $1,500, a 2 p. c.	30 00
Freight and primage	61 15
Fire insurance, $3.60; labor, $3.13	6 73
Cartage, $3.13; storage, $3.12	6 25
Weighing, $2.00; mending, $1.75	3 75
Brokerage	3 12
Commission, 2½ pr. ct.	36 01
	266 39
Cash at date	1,173 98

New York, Nov. 4, 1856.

HENRY SHELDEN, LAWSON & CO.,
Pr. J. H. BALDWIN.

Exhibit B, referred to in defendant's plea.

OFFICE OF HENRY SHELDEN, LAWSON & Co.,
53 Pine street, New York, March 18, 1857.

Mr. JOHN L. CROOM, Wharton:

DEAR SIR: We wrote you the 17th January, requesting you to forward cotton to pay the balance of your note, or draft if you preferred, to which we have no answer.

We have waited on you a long time for the amount of the note, part of which was a joint note of yours and J. W. McCamley. The latter name the writer consented to give up, as you was perfectly good, and it would be more agreeable to you to give up McCamley. I mention these facts to show you the disposition to accommodate, and after waiting so long, have expected more prompt treatment from you. I regret to be under the necessity of saying, that the balance must be paid, or satisfactorily arranged by draft, or the note will be sent out for immediate collection, which I shall much regret, after having waited so long on you. I shall wait a sufficient time for this to reach you, and receive an answer, before I send the note and ac. for collection. Hoping I may not be compelled to this last resort,

I remain yours, respectfully,
HENRY SHELDEN.

And afterwards, on the 21st day of December, 1857, the following proceeding was had in this cause, to wit:

HENRY SHELDEN
v. } No. 693.
JOHN L. CROOM.

On this day came the parties, by their attorneys, and thereupon came on to be heard the motion of the defendants to quash the service of citation herein, and after argument of counsel heard, and the court being now sufficiently advised, it is ordered that said motion be overruled; and thereupon came on to be heard the defendant's motion and affidavit herein for a continuance, and after argument of counsel, the court being now sufficiently advised, it is ordered that said motion be allowed, and the cause continued until the next term of this court.

And afterwards, on the 13th day of July, 1858, the following proceeding was had in this cause:

HENRY SHELDEN
v. } No. 693.
JOHN L. CROOM.

By agreement of counsel, it is ordered that this cause be continued until the next term of this court.

And afterwards, to wit, on the 10th day of January, 1859, the following proceeding was had in this cause:

HENRY SHELDEN
v. } No. 693.
JOHN L. CROOM.

By consent of parties, it is ordered that this cause be set down for hearing on Saturday next.

And afterwards, on the 16th day of February, 1859, the following proceeding was had in this cause:

HENRY SHELDEN
v. } No. 693.
JOHN L. CROOM.

On this day came the parties, by their attorneys, and thereupon came a jury of good and lawful men, viz: Charles Weeden Miller, W. D. C. Hall, Philip Saunders, William T. Saunders, C. B. Adams, William J. Hancock, Harvey Bentick, James Haskins, Samuel Paer, Malcolver K. Hunter, John Crenican, and A. C. Crawford, who being elected, tried, and sworn well and truly to try the issue joined, on their oaths do say: We, the jury, find for the plaintiff in the sum of five thousand seven hundred and ten 75-100 dollars. JAMES HASKINS, *Foreman.*

It is therefore considered by the court, that plaintiff recover of defendant five thousand seven hundred and ten dollars and seventy-five cents, the damages by the jurors aforesaid assessed, and forty seven dollars and cents, his costs about his suit expended, for which execution may issue.

And afterwards, on the 16th day of February, 1859, the defendant, by his attorney, filed the following bill of exception, in words and figures as follows, to wit:

HENRY SHELDEN
v. } No. 693.
JOHN L. CROOM.

Be it remembered, that on the motion of defendant to quash the service of citation in this cause, there was no evidence adduced, except the copy of citation served on said Croom, and the court considered and held the said copy sufficient.

On the trial of the cause, the plaintiff offered in evidence the notes sued on, as follows:

"$3,574 08. WHARTON, TEXAS, May 2, 1856.

On the first day of January next, for value received, I promise to pay Henry Shelden or order, thirty-five hundred and seventy-four 08-100 dollars, with interest from date at ten per cent.

JOHN L. CROOM."

"$1,932 62. WHARTON, TEXAS, May 2, 1856.

On the first day of January next, for value received, I promise to pay Henry Shelden or order, nineteen hundred and thirty-two 62-100 dollars, with interest from date at ten per cent.

JNO. L. CROOM.

To the admission of which the defendant objected, on the ground of a variance between each of said notes, and the description thereof in the petition; but the court overruled said objection, and said notes were read in evidence.

Evidence was then given, both by plaintiff and defendant, on the issue, as to the credit claimed by defendant, and the court charged the jury, that the allowance of said credit was a question of fact, as to which they would form their own opinion from the evidence.

The court further charged, that interest on said notes was to be calculated at the rate of ten per cent. per annum from date to the present time. The defendant, before the retirement of the jury, excepted to the charge of the court as to interest, and the court signs and seals this bill of exceptions to said charge and the ruling of the court in refusing to sustain said motion to quash service of citation.

JOHN C. WATROUS.

And afterwards, on the 25th day of February, 1859, the following power of attorney was filed by defendant's attorneys:

Know all men by these presents, that we, John L. Croom, A. C. Horton, and J. H. Croom, hereby authorize and appoint

William P. Ballinger and Thomas M. Jack, with full power, jointly or severally, for us, and in our names, to execute and deliver any writ of error-bond which may be necessary and proper to prosecute a writ of error to the Supreme Court of the United States, on the judgment to be rendered in the suit now pending in the district court of the United States for the eastern district of Texas, at Galveston, in which Henry Shelden is plaintiff, and said John L. Croom is defendant: the said bond to be executed by said Croom, as principal, and by the other parties next as securities, also to execute a cost bond to the clerk of the Supreme Court in said case, and we hereby ratify and confirm the act of our said attorneys or attorney in the premises.

Given under our hands and seals, this 25th May, 1858.

JOHN L. CROOM, [SEAL.]
A. C. HORTON, [SEAL.]
J. H. CROOM. [SEAL.]

The State of Texas, county of Wharton.

I, Solomon J. Thomas, clerk of the county court of said county, do hereby certify that I am well acquainted with John L. Croom, of Matagorda county, and Albert C. Horton, of Wharton county; that they are responsible persons, and that they are worth more than twenty thousand dollars, so far as I know and believe, after the payment of all of their debts; and that the foregoing is a valid instrument of security for the amount, purpose, and intent as therein expressed, and were the same tendered to me in my official capacity, I should receive the same as good and valid security. I further certify that the signatures of the said John L. Croom and A. C. Horton are genuine.

[L. S.] Given under my hand and seal of office, at Wharton, this 25th day of May, 1858.

S. J. THOMAS,
Clerk C. C. W. C.

I, Walter Andrews, clerk of the county court of Fort Bend county, in the State of Texas, duly commissioned and qualified, do hereby certify, that I am personally acquainted with Albert C. Horton and J. H. Croom, whose names appear to the end of the annexed instrument of writing, bearing date the 25th day of May, 1858, the last named being a citizen of Fort Bend county, and the first named a citizen of the county of Wharton, in said State, and that they are respectable persons, and are worth respectively more than twenty thousand (20,000) dollars, so far as I know and believe, after the payment of all debts due by them, and that the foregoing is a valid instrument of security for the amount, purpose, and intent as therein expressed, and were the same tendered to me in my official capacity, I should receive the same as good and valid security, and further, that I believe the signatures of said parties to said annexed instrument is genuine.

In testimony of which, I have hereunto set my hand and the seal of said county court, at office in Richmond, this 28th of May, 1858. [SEAL.]

WALTER ANDREWS,
Clerk C. C., F. B. C.

And afterwards, on the 25th day of February, 1859, the following bond was filed in this cause:

District court of the United States for the eastern district of Texas, at Galveston.

HENRY SHELDEN
v. } In error.
JOHN L. CROOM.

Know all men by these presents, that we, John L. Croom, as principal, and A. C. Horton and J. H. Croom as sureties, are held and firmly bound unto the above named Henry Shelden in the sum of eleven thousand seven hundred and ten 75-100 dollars, to be paid to the said Henry Shelden, his executors and administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this 24th day of February, 1859.

Whereas the above named John L. Croom hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit by the said district court of the United States for the eastern district of Texas, at Galveston, on the 16th day of February, 1859, in favor of the said Henry Shelden against the said John L. Croom, for the sum of five thousand seven hundred and ten 75-100 dollars, and also for forty-seven dollars costs therein:

Now, therefore, the condition of this obligation is such, that if the above named John L. Croom shall prosecute his said writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN L. CROOM, [SEAL.]
By W. P. BALLINGER,
his attorney in fact.
A. C. HORTON, [SEAL.]
By W. P. BALLINGER,
his attorney in fact.
J. H. CROOM, [SEAL.]
By H. P. BALLINGER,
his attorney in fact.

Sealed and delivered in presence of—

Approved: JOHN C. WATROUS.

And afterwards, to wit, on the 25th day of February, 1859, the defendant sued out and filed a writ of error in words and figures as follows, to wit:

The United States of America, ss.

The President of the United States to the judge of the district court of the United States, holden in and for the eastern district of Texas, at Galveston, greeting:

Because, that in the record and process, and also in the rendering of judgment in the suit before you, between Henry Shelden, plaintiff, and John L. Croom, defendant, in a plea of assumpsits and promissory notes, a manifest error has intervened, to the great damage of the said defendant, John L. Croom, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, at Washington aforesaid, this 24th day of February, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES LOVE,
Clerk U. S. District Court, Eastern District of Texas.

Allowed: JOHN C. WATROUS.

And afterwards, on the 25th day of February, 1859, the following citation was issued and filed:

The United States of America, ss., to Henry Shelden, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Texas, at Galveston, wherein John L. Croom is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error

mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable John C. Watrous, judge of the district court of the United States for the eastern district of Texas, at Galveston, this 24th day of February, in the year of our Lord 1859.

JOHN C. WATROUS.

Service acknowledged, February 25th, 1859.

PHILIP C. TUCKER, JR.,
Att'y for Defendant.

United States of America, district court of the United States, eastern district of Texas, at Galveston.

I, James Love, clerk of the United States district court for the eastern district of Texas, at Galveston, certify that the foregoing twenty-six pages is a true and perfect transcript of the record and all the proceedings had in case number six seventy-three on the law docket, in the case of Henry Shelden, plaintiff, and John L. Croom, defendant.

In testimony whereof, I hereunto subscribe my name as clerk aforesaid, and have caused the seal of court to be affixed, on the eleventh day November, A. D. 1859, and in the eighty-fourth year of the independence of the United States of America.

[SEAL.]

JAMES LOVE, *Clerk.*

Supreme Court of the United States.

DECEMBER TERM, 1866.

No. 13.

JOHN L. CROOM, Plaintiff in Error, *vs.* P. C. TUCKER, Administrator of Henry Shelden, deceased, Defendant in Error.	From the District Court of the United States for the Eastern District of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Suit in this case, was brought in the District Court of the United States for the Eastern District of Texas, on two promissory notes which are set out in the Plaintiff's petition, (Record pp. 1, 2) as follows:

"$3,574 08. WHARTON, TEXAS, *May* 2, 1856.

"On the first day of January next, for value received, I promise to pay Henry Shelden, or order, thirty-five hundred seventy-four 08-100 dollars, with interest from date, at ten per cent.

"JOHN L. CROOM."

"$1,932 62-100. WHARTON, *May* 2, 1856.

"On the first day of January next, for value received, I promise to pay Henry Shelden, or order, nineteen hundred and thirty-two 62-100 dollars, with interest from date, at ten per cent.

"JOHN L. CROOM."

The Court charged the Jury, (Record p. 9) that "interest on said notes, was to be calculated at the rate of *ten* per cent. per annum, from date, *to the present time;*" to which charge the Defendant excepted, and prosecuted his writ of error.

POINTS AND AUTHORITIES.

The single question is, whether the promissory notes in question, bore interest at the rate of *ten* per cent. per annum, *after their maturity.*

The statute of Texas, governing interest, is as follows:

"1. The distinction between legal and conventional interest shall be known and recognized by the laws of this Republic.

"2. On all written contracts ascertaining the sum due, when no specific premium or rate of interest is expressed, interest shall be taken, recovered and allowed at the rate of eight per centum per annum, from and after the said sum is due and payable.

"3. The parties to any written contract, may agree to, and stipulate for, any premium or rate of interest not exceeding twelve per centum per annum, on the amount or value of the contract; and the same may be taken, recovered and allowed."

Hartley's Digest, Articles 1606–8.

The decision of this Court, in the case of Brewster *vs.* Wakefield, (22 Howard, 118) is decisive of this case, in favor of the Plaintiff in Error.

Reference is, also, made to the following authorities:

Macomber *vs.* Dunham, 8 Wendell, 550.

United States Bank *vs.* Chapin, 9 Wendell, 471.

Ludwig *vs.* Huntsinger, 5 Watts & Sergeant, 51, 60.

GREEN ADAMS,
ROBERT LEECH,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1857. NO. 7

JOHN L. CROOM, *Plaintiff in Error,*

Against

HENRY SHELDEN *Defendant in Error.*

Writ of Error to Circuit Court of the U. States for Eastern District of Texas.

Supreme Court of the United States.

DECEMBER TERM, 1866. NO. 13.

JOHN L. CROOM, *Plaintiff in Error,*
Against
HENRY SHELDEN *Defendant in Error.*

Writ of Error to Circuit Court of the U. States for Eastern District of Texas.

Abstract of the Case.

The action is on two notes of John L. Croom, dated Wharton, Texas, May 2, 1856, and payable on the first day of January following to Henry Shelden, or order—one for $3,574.08, and the other for $1,932.62, making, together, $5,506.70, and both with interest from date at ten per cent. The two notes are correctly copied in and form part of the petition; and the petitioner prays judgement for the amount of said notes, with interest, according to their tenor.

The defendant (p. 3) demurred to the petition, and denied its allegations; and afterwards filed an exception to the service of the process, (p. 3, 4,) and moved to quash the service. The motion was overruled, (p. 8, 9;) and the opinion of the Court is not excepted to.

The defendant put in a plea saying "that it is true, as alleged in plaintiff's petition, that on the second day of May, 1856, he executed and delivered to plaintiff the two notes therein described, both maturing on the 1st of January, 1857," but claiming against the notes a set-off of $1,173.98, with interest at the rate of eight per cent. (p. 5, 6.)

Although by his plea he had not denied, but expressly admitted the execution and delivery to plaintiff of the two

notes described in the petition, he nevertheless, at the trial before the jury, objected to the admission of the notes on the ground of variance. The Court overruled this objection, (p. 9;) and there is no exception to its opinion.

Evidence was then given as to the credit or set-off claimed; and upon this question of fact the jury formed their own opinion from the evidence, (p. 9.) They seem to have allowed the credit or set-off; for the verdict is only for $5,710.75 damages. Judgment is given for the damages and costs.

To a charge of the Court that interest on the notes was to be calculated at the rate of 10 per cent. per annum from the date to the time of trial, the defendant may have excepted before the retirement of the jury. It is said he did, in a bill of exceptions appearing to be signed, but not sealed by the judge.

Points and Authorities.

1. If there were any defect in the service of the process, such defect should have been made the ground of exception or motion before defendant demurred to the petition and denied its allegations. By so demurring and denying, he has waived such defect if any there was. 2 Tidd's Pr. 181, 562; 1 Archb. Pract., p. 521 of Lond. ed., 1840; *Knox, &c.* v. *Summers, &c.*, 3 Cranch, 496; *Pollard, &c.*, v. *Dwight, &c.*, 4 Ib., 428; *Cooke* v. *Gibbs*, 3 Mass., 195; *Turberville* v. *Long*, 3 H. & M., 309; *Payne, &c.*, v. *Grim*, 2 Munf., 297; *Ames* v. *Winsor*, 19 Pick., 249; *Carlisle* v. *Weston*, 21 Ib., 535; *Sheppard, &c.* v. *Groves*, 14 How., 511. But here the process appears by the marshal's return thereon (pp. 2, 3) to have been legally served; and the defendant is estopped from showing matter repugnant to the return, (*Slayton* v. *Inhabs. of Chester*, 4 Mass., 478.) Even if he be not so estopped, he has not sustained his allegations of insufficient service. His motion to quash being overruled, an Appellate Court must presume that the decision of the

Court below was authorized by the facts proved before that Court, unless the contrary appear in a bill of exceptions, and the decision as to that matter is not excepted to (p. 9.) If, notwithstanding the want of such exceptions, an Appellate Court should be at liberty to conclude "there was no evidence adduced except the copy of citation served on said Croom," still that is enough; for it does not follow that the copy served on him is the copy referred to and made an exhibit in defendant's plea (p. 4;) and even if it did, that copy might well be held sufficient.

2. The demurrer to the petition, if not before waived, was, in effect, overruled by the final judgment. *Cooke* v. *Thornton*, 6 Rand., 8; *Anderson* v. *Barry, &c.*, 2 J. J. Mar., 281; *Thompson* v. *Thompson*, 4 B. Monroe, 503; and was properly overruled.

3. The bill of exceptions may not properly be a part of the record if it has not, as the statute of Westm., 2 (13 Edw. I) requires, the seal of a Justice. 2 Inst., 427; Bull, N. P., 319; *Money, &c.* v. *Leach*, 3 Burr, 1692; 2 Tidd's Pr., 913; 1 Arch. Pract., p. 311 of Lond. ed., 1840; *Pomroy's Lessee* v. *Bank of Indiana*, 1 Wallace, 399. But if the Appellate Court can look at it and see that the Court below charges that interest on the notes was to be calculated at the rate of 10 per cent. per annum from date to the time of trial, that charge was correct. For in the notes there is a stipulation for interest from date at 10 per cent.; and this stipulation is authorized by the law of Texas where the contract was made; the act of Jan. 18, 1840, providing "that the parties to any written contract may agree to and stipulate for any premium or rate of interest not exceeding 12 per centum per annum on the amount or value of the contract; and the same may be taken, recovered, and allowed." See Sess. Acts 1839–'40, p. 8, sec. 4; *Pridgen* v. *Andrews*, 7 Texas, 461; *Jewett* v. *Thompson*, 8 Ib., 437; *Hopkins* v. *Crittenden*, 10 Ib., 189; *Matthews* v. *Hancock*, 20 Ib., 6. ~~The~~ To that act and the construction thereof in the supreme court of Texas, it is more material to look than to the statute of New York expounded in Macomber v Dunham 8 Wend 559 or the statute of Minnesota expounded in Brewster v Wakefield 22 How. 127 or the case there cited of U. S. Bank v Chapman 9 Wend. 471 and Ludwick v Hamburger 5 W. & S. 99. The

contract made in Texas is governed by the laws of Texas in every thing which relates to the mode of construing it; the meaning to be attached to the expressions by which the parties may have engaged themselves, and the nature and validity of that engagement. *Morris* v. *Eves*, 11 Mart. O. S., 731; *Bank of Marietta* v. *Pindall, &c.*, 2 Rand., 472–3. Nor is this rule affected by the circumstance that Shelden, the plaintiff, sues as a citizen of New York. It does not follow that he resided out of Texas when the contract was made; *Nelson & Wife* v. *Bond*, 1 Gill, 218; and even if he did, the rule would be the same, for the debtor was not bound to go out of Texas to pay his creditor. Lit. § 340; Co. Lit. 210*b*. The rule would be the same even if the notes were in express terms payable in New York. For, in a note executed in one State, the creditor may stipulate for the legal rate of conventional interest authorized by the law of that State, although such a rate be disallowed in the State wherein payment is to be made. See *Depau* v. *Humphreys*, 8 Mart., U. S. 1; *Chapman* v. *Robertson*, 6 Paige, 634, cited in 1 Rob. Pract., 84; *Andrews* v. *Hoxie*, 5 Texas, 190. This Court has affirmed the same rule—that if the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract for the higher rate. *Miller* v. *Tiffany*, 1 Wallace, 310.

4. The judgment should be affirmed with damages or interest, according to rule No. 23, secs. 1, 3. Even though the writ of error should not appear to have been sued out merely for delay, yet interest should be calculated from the date of the judgment below, until the same is paid, at the rate of *ten* per centum. *Pridgen* v. *Andrews*, 7 Texas, 461; *Jewett* v. *Thompson*, 8 Ib., 437; *Hopkins* v. *Crittenden*, 10 Ib., 189; *Matthews* v. *Hancock*, 20 Ib., 6.

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